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EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/572,719
Filing Date: March 21, 2006
Appellant(s): VERMEER, RONALD

David L. Vanik
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed May 11 2011 appealing from the Office action mailed February 7 2011.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 11, 14-15, 17, 22 and 25-36 are pending and rejected.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

USPGPUB 20010051175	Strom et al. et al.	12-2001
EP 1023832	Aven	2-2000
USPGPUB 20020040044	Schlatter	4-2002
US Patent 6103717	Heinemann et al.	8-2000
US Patent 6559136	Mauler-Machnik et al.	5-2003
USPGPUB 20030035852	Pullen	2-2003

Grayson et al., Effect of Adjuvants on the Performance of New Cereal Fungicide, Metconazole. I Glasshouse Trials, Pestic. Sci., 1995, 45, 153-160.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 11, 14-15, 17, 22 and 26-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. et al. in view of Grayson et al. and Aven as evidenced by Schlatter.

**Determination of the Scope and Content of the Prior Art
(MPEP §2141.01)**

Strom et al. et al. is directed to aqueous dispersions of agricultural chemicals. Examples of active agents that can be utilized include insecticides such as triazoles

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(paragraph 0012) and fungicides such as azoles such as hexaconazole and strobilurins such as azoxystrobin (paragraph 00130). The surface active agent included may be anionic, cationic or nonionic, or combinations of cationic and nonionic or anionic and nonionic. A stabilizing amount of the surfactant is used, preferably not less than about 1% and not more than 30% by weight based on the total weight of the water, pesticide and surfactant (paragraph 0014). Specific examples of commercially available surface active agents include Atlox 4991 and 4913 (methyl 2-methyl-2-propenoate and α -(2-methyl-1-oxo-2-propenyl)- ω -methoxy-poly(oxy-1,2-ethanediyl) surfactants (nonionic), Pluronic P104 (nonionic), and Soprophor FL surfactant (tristyrylphenoethoxylates, anionic). The pesticide is in an amount from about 1 to about 60% (claim 1). Exemplified pesticides include epoxiconazole (example 7).

**Ascertainment of the Difference Between Scope the Prior Art and the Claims
(MPEP §2141.012)**

While Strom et al. et al. teach surfactant combinations of an anionic and nonionic surfactant, Strom et al. et al. do not exemplify utilizing Atlox 4913 in combination with Soprophor FL.

Strom et al. et al. do not teach the incorporation of an alkanolethoxylate. However, this deficiency is cured by Grayson et al.

Grayson et al. is directed to the effect of adjuvants on the performance of the fungicide metconazole. It is taught that suspension concentrates which are generally less active saw around a 35-fold enhancement with the addition of Genapol C12/C14 alcohol ethoxylates (abstract). Table 2 shows the efficacy of the addition of the Genapol adjuvants to suspension concentrates. Genapol adjuvants utilized are C050,

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C080, C100 and C200 (page 155, section 2.3). It is taught that Genapol adjuvants possess the capability of drastically improving the performance of particulate formulations of agrochemicals so that their activities exceed those of solution formulations without adjuvants and approach the activities of solution formulations with adjuvants (page 158, section 3, right column, first paragraph).

While Strom et al. et al. teach that triazoles can be incorporated, Strom et al. et al. do not teach the incorporation of tebuconazole, metaminostrobin or tebuconazole and trifloxystrobin. While Strom et al. et al. teach the use of pluronic surfactants, Strom et al. et al. does not teach the use of Pluronic PE 10500. However, these deficiencies are cured by Aven.

Aven is directed to aqueous suspension concentrates. The compositions comprise 50 to 400 g/L of a crop protection compound, 50 to 500 g/L of an adjuvant and at least one surfactant selected from the group consisting of (c1) 5 to 75 g/L of one or more non-ionic dispersant and (c2) 10 to 100 g/L of one or more anionic dispersants (abstract). Fungicides taught include azoxystrobin, epoxiconazole, metconazole, SSF-126 and trifloxystrobin (paragraph 0017). Surfactants/dispersants taught include non-ionic dispersants such as polyethyleneoxide-polypropyleneoxide block copolymers (paragraph 0042). The most preferred are the Pluronic type block copolymers such as Pluronic PE 10500 (propylene oxide/ethylene oxide block copolymers having molecular weights between 8000 and 10,000) (paragraph 0043). Anionic dispersants taught include Soprophor FL (table page 10). Both Pluronic PE 10500 and Soprophor FL are exemplified. It is taught that appropriate relative amount of active ingredient and

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adjuvants lie between 1:0.5 and 1:100. In general, the pesticidal efficacy can be enhanced to a higher degree by the addition of larger amount of adjuvant (b) (paragraph 0047). The compositions are produced so as to obtain a stable non-sedimenting flowable product and usually contain 0 to 15% w/v antifreeze agent, 0 to 10% of suspending agents, 0 to 2.5% w/v preservatives and 0 to 10% w/v of other additives such as defoamers, corrosion inhibitors, etc. and an organic liquid in which the active ingredient is substantially insoluble (paragraph 0054). Anti-foaming agents are silicone oils such as polyalkylsiloxanes (paragraph 0055). The compositions also comprise structuring agents (thickeners) (paragraph 0052). Exemplified anti-freeze agents include propylene glycol (example 7).

***Finding of Prima Facie Obviousness Rationale and Motivation
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Aven and Grayson et al. and utilize an ethoxylate alcohol as a surfactant adjuvant in order to enhance foliar uptake. One of ordinary skill in the art would have been motivated to add an ethoxylated alcohol as Grayson et al. teach that these adjuvants when added to suspension concentrates drastically enhance their performance. Therefore, one of ordinary skill in the art would have been motivated to add ethoxylate alcohols such as the Genapol adjuvants to the formulation of Strom et al. et al. to enhance absorbance of the pesticides based on the teachings of Grayson et al. There is a reasonable expectation that the effect seen with metconazole as taught by Grayson et al. would reasonably apply to other azoles such as tebuconazole. One of ordinary skill in the art

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would have a reasonable expectation of success as both metconazole and tebuconazole are azole fungicides (both species of the same genus) and therefore would functionally be expected to behave similarly.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Aven and Grayson et al. and utilize an anionic and nonionic surfactant in combination together such as Atlox 4913 and Soprophor FL. One of ordinary skill in the art would have been motivated to utilize a combination of an anionic and nonionic surfactant as this is one specific combination taught as being suitable. Atlox 4913 is a specifically taught commercially available nonionic surfactant and Soprophor FL is a specifically taught commercially available anionic surfactant. Therefore, it would have been obvious to one of ordinary skill in the art to utilize these specifically taught surfactants in a specifically taught surfactant combination.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Aven and Grayson et al. and utilize Pluronic PE 10500 in combination with Atlox 4913 or Soprophor FL. One of ordinary skill in the art would have been motivated to utilize this combination as Strom et al. et al. suggest utilizing Pluronic surfactants and Aven teach that the pesticidal efficacy can be enhanced to a higher degree by the addition of larger amount of adjuvant. Therefore, it would have been obvious to one of ordinary skill in the art to utilize Pluronic PE 10500 in combination with Atlox 4913 or Soprophor FL in order to

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provide a larger amount of adjuvant which would be expected to enhance pesticidal efficacy as taught by Aven.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Aven and Grayson et al. and utilize tebuconazole, metaminostrobin and trifloxystrobin in the invention of Strom et al. et al. One of ordinary skill in the art would have been motivated to add these active compounds as Strom et al. et al. teach that triazoles can be included and the taught triazoles (epoxiconazole and hexaconazole) have the same function (i.e. fungicide) as tebuconazole, metaminostrobin and trifloxystrobin as taught by Aven. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Aven and Grayson et al. and utilize conventional additives such as preservatives, antifreeze agent, thickener (structuring agent) and defoamer. One of ordinary skill in the art would have been motivated to utilize these ingredients as they are conventional for suspension concentrates as taught by Aven. Therefore, all of the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions and the combination would

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have yielded predictable results to one of ordinary skill in the art at the time of the invention. **Note: MPEP 2141 [R-6]** *KSR International CO. v. Teleflex Inc.* 82 USPQ 2d 1385 (Supreme Court 2007).

Regarding the claimed amount of active compound, water and dispersant mixture, Strom et al. et al. teach an amount that overlaps that instantly claimed. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5].**

Regarding the claimed amount of the alcohol ethoxylate, the amount of an ethoxylate in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ and reasonably would expect success. It would have been customary for an artisan of ordinary skill to determine the optimal amount of ethoxylate to add in order to best achieve the desired absorbance. It would have been obvious to one of ordinary skill in the art at the time of the invention to engage in routine experimentation to determine optimal or workable ranges that produce expected results. Where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation. *In re Aller*, 220 F. 2d 454, 105 USPQ 233 (CCPA 1955).

Regarding the claimed length of the alkanolethoxylate, Grayson et al. teach an amount that overlaps that instantly claimed with specific examples falling within the instant claimed range. In the case where the claimed ranges "overlap or lie inside

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ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5].**

Regarding the claimed metaminostrobin, as evidenced by Schlatter SSF-126 is metaminostrobin (paragraph 0030).

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

Claims 11 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. et al. in view of Grayson et al. and in further view of Mauler-Machnik et al. and Heinemann et al.

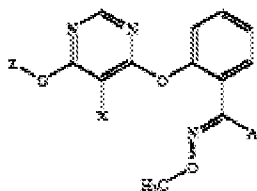
**Determination of the Scope and Content of the Prior Art
(MPEP §2141.01)**

The teachings of Strom et al. et al. and Grayson et al. are set forth above. Strom et al. et al. is directed to aqueous dispersion comprising active compounds which include triazoles such as epoxiconazole and hexaconazole. The active ingredients are combined with surfactant combinations and water to form pesticidal compositions. Grayson et al. teach that the addition of adjuvants such as ethoxylated alcohols (Genapol) enhance absorption of metconazole.

**Ascertainment of the Difference Between Scope the Prior Art and the Claims
(MPEP §2141.012)**

Strom et al. et al. do not specify that the fungicides are fluoxastrobin and prothioconazole can be added. However, this deficiency is cured by Heinemann et al. and Mauler-Machnik et al.

Mauler-Machnik et al. found that utilizing fungicide compounds of general formula I in combination with other fungicides such as tebuconazole (3), epoxiconazole (10), metconazole (11), 2-(1-chloro-cyclopropyl)-1-(2-chlorophenyl)-3(5-mercapto-1,2,4-triazol-1-yl)-propan-2-ol (aka prothioconazole) (69) and trifloxystrobin (75) found in columns 1 and 2 and claim 1 have very good fungicidal properties (column 2, lines 60-62). Compounds of Formula I have the following structure:



in which

Z represents optionally substituted phenyl,

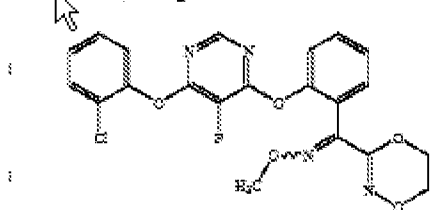
X represents halogen and

A represents heterocyclyl —COOCH₃, or —CO—NH—CH₃ and

It is taught that the compounds of the formula I are known for example in WO 9727189 (column 3, lines 34-35).

Heinemann et al. (wherein US Patent No. 6103717 is serving as the English Language Equivalent) teach the compounds of formula 1 from Mauler-Machnik et al. One specific compound claimed is:

9. The compound of the formula (I) according to claim 1, which is 3-{1-[2-(4-chlorophenoxy)-5-fluoropyrimidin-5-ylonyl]-phenyl}-1-(methoxymino)-methyl)-5,6-dihydro-1,4,2-dioxazine, having the formula:



This compound is fluoxastrobin.

***Finding of Prima Facie Obviousness Rationale and Motivation
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Grayson et al., Mauler-Machnik et al. and Heinemann et al. and utilize fluoxastrobin and prothioconazole in the invention of Strom et al. et al. One of ordinary skill in the art would have been motivated to utilize fluoxastrobin and prothioconazole as Mauler-Machnik et al. teach utilizing generic compounds which encompass fluoxastrobin in combination with epoxiconazole and prothioconazole. Since Mauler-Machnik et al. teach compounds of their formula I can be found in Heinemann et al., one of ordinary skill in the art would look to this patent for specific compounds of formula I. One specific compound taught and claimed is fluoxastrobin. Therefore, Mauler-Machnik et al. teach utilizing fluoxastrobin in combination with epoxiconazole and prothioconazole and their combination would have been obvious to one of ordinary skill in the art. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very

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same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Grayson et al., Mauler-Machnik et al. and Heinemann et al. and utilize an ethoxylate alcohol as a surfactant adjuvant in order to enhance foliar uptake. One of ordinary skill in the art would have been motivated to add an ethoxylated alcohol as Grayson et al. teach that these adjuvants when added to suspension concentrates drastically enhance their performance. Therefore, one of ordinary skill in the art would have been motivated to add ethoxylate alcohols such as the Genapol adjuvants to the formulation of Strom et al. et al. to enhance absorbance of the pesticides based on the teachings of Grayson et al. There is a reasonable expectation that the effect seen with metconazole as taught by Grayson et al. would reasonably apply to other azoles such as tebuconazole. One of ordinary skill in the art would have a reasonable expectation success as both metconazole and tebuconazole are azole fungicides (both species of the same genus) and therefore would functionally be expected to behave similarly.

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. et al. in view of Grayson et al. and Aven as evidenced by Schlatter and in further view of Pullen.

**Determination of the Scope and Content of the Prior Art
(MPEP §2141.01)**

The teachings of Strom et al. et al., Grayson et al. and Aven are set forth above. Strom et al. et al. is directed to aqueous dispersion comprising active compounds which include triazoles such as epoxiconazole and hexaconazole. The active ingredients are combined with surfactant combinations and water to form pesticidal compositions. Grayson et al. teach that the addition of adjuvants such as ethoxylated alcohols (Genapol) enhance absorption of metconazole. Aven is directed to suspension concentrates comprising triazoles and strobins. The compositions comprise conventional ingredients such as preservatives.

**Ascertainment of the Difference Between Scope the Prior Art and the Claims
(MPEP §2141.012)**

Neither Strom et al. et al. or Aven teach utilizing butylated hydroxytoluene as a preservative. However, this deficiency is cured by Pullen.

Pullen is directed to insecticides and fungicides. Preservatives taught include butylated hydroxytoluene (paragraph 0034).

***Finding of Prima Facie Obviousness Rationale and Motivation*
(MPEP §2142-2143)**

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Aven, Grayson et al. and Pullen and utilize butylated hydroxytoluene. It would have been obvious to one of

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ordinary skill in the art to try preservatives known to be utilized with fungicides and herbicides as a person with ordinary skill has good reason to pursue known options within his or her technical grasp. **Note: MPEP 2141 [R-6] *KSR International CO. v. Teleflex Inc.* 82 USPQ 2d 1385 (Supreme Court 2007).**

Claim 36 is rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. et al. in view of Grayson et al. and Aven and in further view of Schlatter.

**Determination of the Scope and Content of the Prior Art
(MPEP §2141.01)**

The teachings of Strom et al. et al., Grayson et al. and Aven are set forth above. Strom et al. et al. is directed to aqueous dispersion comprising active compounds which include triazoles such as epoxiconazole and hexaconazole. The active ingredients are combined with surfactant combinations and water to form pesticidal compositions. Grayson et al. teach that the addition of adjuvants such as ethoxylated alcohols (Genapol) enhance absorption of metconazole. Aven is directed to suspension concentrates comprising triazoles and strobins. The compositions comprise conventional ingredients solvents.

**Ascertainment of the Difference Between Scope the Prior Art and the Claims
(MPEP §2141.012)**

Neither Strom et al. et al. or Aven teach utilizing a vegetable oil as a solvent in the suspension concentrates. However, this deficiency is cured by Schlatter.

Schlatter is directed to pesticidal composition in the form of suspension concentrates comprising a triazole fungicide. It is taught that water immiscible solvents such as plant oils like soybean oil (paragraph 0046).

***Finding of Prima Facie Obviousness Rationale and Motivation
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al. et al., Aven, Grayson et al. and Schlatter and utilize plant oils such as soybean oil. One of ordinary skill in the art would have been motivated to add an oil in order to aid in the solubilization or suspension of components of the suspension concentrate as taught by Schlatter.

(10) Response to Argument

Appellant argues (1) the claims recite the language of “consisting of” and the examiner does not properly consider this recitation when rejecting the claims. Appellant argues that (2) the cited references provide no motivation to include the instantly claimed active compounds in the claimed suspension concentrate. Appellant argues that (3) none of the cited references teach the instantly claimed amount of penetration enhancer of Formula I. Appellant argues that Grayson disclose that Genapol C050 and Genapol C080 were superior to Genapol C100 and C200. Appellant argues that (4) the cited references do not teach or suggest the instantly claimed amount of the claimed dispersant mixture. Appellant argues that (5) the declaration filed by Dr. Peter Bauer provides for unexpected results. Appellant argues that (6) there is no motivation to add

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butylated hydroxytoluene to the composition. Appellant argues that (7) there is no motivation to add vegetable oil to the composition.

The arguments by Appellant are not found persuasive for the following reasons.

Regarding Appellant's first argument, while the examiner acknowledge Appellants' consisting of language the claim recites between 0 and 15% of one or more additives, therefore, other components can be included. While Strom et al. does teach active compounds which are different from those instantly claimed, the rejection is based on the use of the specifically claimed active compounds to be used in place of those exemplified by Strom et al. Strom et al. suggest classes of compounds in which the instantly claimed compounds fall into and the examiner has used secondary references (Aven, Mauler-Machnik and Heinemann) to show that the instantly claimed compounds are known species of the classes taught by Strom et al. While Strom et al. may exemplify amounts of water that fall outside the scope of the instant claims, the rejection is made under 103 and does not need to exemplify all embodiments, only suggest them. "Disclosed examples and preferred embodiments do not constitute a teaching away from the broader disclosure or non-preferred embodiment." *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). Strom et al. teach the combination of surfactant, water and an active compound. Surfactants are present in 1 to 30% and the active compounds are present from 1 to 60%. Thereby, by default, water is present from 98 to 10%. Clearly, these amounts overlap with those instantly claimed.

Regarding Appellant's second argument, the examiner cannot agree. Strom et al. et al. suggest classes of compounds such as azoles and strobilurins. Therefore, one

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of ordinary skill in the art would have been motivated to select compounds from these classes. Aven teaches that the instantly claimed active compounds are well known, commercially available, and utilized for the fungicidal activity as does Mauler and Heinemann. Therefore, one of ordinary skill in the art would have been motivated to select any compound(s) from the list taught by Aven, Mauler and Heinemann.

Appellants have not demonstrated the unobviousness of the instantly claimed compounds. Therefore, since Strom et al. et al. suggests the class of fungicides, the examiner maintains that absent a showing of unexpected results, selection of any compound(s) from these classes would have been obvious.

Regarding Appellant's third argument, Grayson et al. teach that these adjuvants (compounds of instantly claimed Formula I) when added to suspension concentrates drastically enhance their performance. Therefore, one of ordinary skill in the art would have been motivated to add ethoxylate alcohols, such as, the Genapol adjuvants to the formulation of Strom et al. et al. to enhance absorbance of the pesticides based on the teachings of Grayson et al. This provides the motivation to select this compound and add it to the composition of Strom et al. et al. Appellants argue that metconazole, prothioconazole and tebuconazole are structurally different, therefore, it would not have been obvious. The fungicides metconazole, tebuconazole, and prothioconazole all possess the same core and therefore would be expected to be effected similarly by the inclusion of the Genapol ethoxylates. Therefore, a *prima facie* case of obviousness has been established. In order to overcome the rejection, Appellant would have to demonstrate why one of ordinary skill in the art would not expect the Genapol

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ethoxylates to behave similarly with other azoles of the genus or the other specifically claimed azoles. Appellant argues that Grayson determines that metconazole works best with alcohol ethoxylates with a lower ethylene oxide content. Appellants do not point out where Grayson teaches this. Grayson teaches that "genapols C050 and C080 were marginally, though not with statistical significance, superior to Genapols C100 and C200" (page 159, left column). While the lower ethylene oxide content may be slightly better, they are not better with any statistical significance. Therefore, one of ordinary skill in the art would expect them to all behave relatively the same. Appellants argue that Grayson does not teach the claimed amount of penetration enhancer. While the exact amount of the penetration enhancer is not disclosed by Grayson, it is generally noted that differences in amounts do not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In *Re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Given that Appellant did not point out the criticality of the concentration of penetration enhancer of the invention, it is concluded that the normal desire of scientists or artisans to improve upon what is already generally known would provide the motivation to determine the optimal amount of penetration enhancer.

Regarding Appellant's fourth argument, Strom et al. teach surfactants are present from 1 to 30%. Strom et al. also suggest the use of combinations of cationic and nonionic or anionic and nonionic. "The normal desire of scientists or artisans to

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improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages.” *In re Hoeschele*, 406 F.2d 1403, 160 USPQ 809 (CCPA 1969).

Therefore, since the total amount of surfactant is suggested by Strom et al. and combinations of surfactants are suggested by Strom et al the instantly claimed concentration of surfactants is *prima facie* obvious.

Regarding Appellant's fifth argument, the declarations of Dr. Bauer show that Genapol C 100 enhances the penetration of tebuconazole when compared to compositions comprising only tebuconazole or tebuconazole and Atlox 4984. However, this result is not unexpected. Grayson teaches Genapol compounds enhance the penetration of metaconazole in suspension concentrates significantly. Therefore, one of ordinary skill in the art would not find appellant's results unexpected. Appellant has not shown that the penetration enhancement of the Genapol compounds with the instantly claimed active agents is unexpectedly better than one of ordinary skill in the art would expect (i.e. unexpectedly better than the enhancement seen with metconazole).

Regarding Appellant's sixth argument, Aven suggests that preservatives are conventional ingredients. Therefore, it would have been obvious to one of ordinary skill in the art to determine what preservatives could be used. One of ordinary skill in the art would have been motivated to look to Pullen as Pullen is directed to a similar (fungicide and pesticide) composition. Preservatives, by definition, serve a particular purpose in compositions. Therefore, one of ordinary skill in the art would have been motivated to add a preservative in order to preserve the final composition and one of ordinary skill in

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the art would have had a reasonable expectation of success as preservatives are conventional ingredients added to suspension concentrates.

Regarding Appellant's seventh argument, Aven teaches that solvents are conventional ingredients to add to suspension concentrations. Schlatter teaches that one of the solvents known to be useful in suspension concentrates is soybean oil. Therefore, one of ordinary skill in the art would have been motivated to add an oil in order to aid in the solubilization or suspension of components of the suspension concentrate as taught by Schlatter.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Johann R. Richter/

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